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ABSTRACT

In the wake of several federal court decisions limiting the authority of school officials to censor the high school press, the tort liability of teachers and advisers is not yet clear. However, it does appear that there are two areas where the journalism teacher can be found negligent for breach of the duties to instruct and to supervise properly. Liability could result from "misfeasance," whereby the teacher assigns a student reporter to a risky or dangerous story that might result in injury to that student. The teacher might also be held liable for "nonfeasance" if he or she fails to advise a student reporter or editor properly concerning tortious content of a story or fails to provide proper instruction within the curriculum concerning the legal responsibilities of newsgathering and publishing. In brief, journalism training in the public schools can no longer be confined to the practical skills of newsgathering and reporting. Every curriculum must include instruction on the legal responsibilities of publication. The best protection schools can have against lawsuits is to hire only certified journalism teachers, preferably those with some professional experience. (Author/FL)

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SECONDARY EDUCATION DIVISION

TORT LIABILITY OF THE PUBLIC SECONDARY SCHOOL JOURNALISM TEACHER FOR INVESTIGATIVE REPORTING ASSIGNMENTS

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Tort Liability of the Public Secondary School Journalism Teacher For Investigative Reporting Assignments

I. INTRODUCTION

The respect and autonomy that public schools once took for granted have eroded. The notion of reverence for institutions has been replaced by one of hostility from a more sophisticated consumer-oriented society that demands accountability. Teacher incompetence, the lowering of academic standards and the failure to enforce discipline represent just a few of the allegations that have penetrated the tranquility and sanctity of the educational community. And the demand for full Constitutional rights for students within the "schoolhouse gate" has challenged the once unquestioned authority of administrators and teachers.[1]

Recent history suggests that the courts will play an increasingly influential role in the affairs of academia. As one legal scholar, in commenting on the legal rights and responsibilities of students, has noted:

> No area of the law appears more dynamic and expanding than school law. Publications on the subject continue to be introduced and distributed in rapidly increasing numbers. Membership in national organizations dealing with the legal problems of educational administration also demonstrates the scope and reach of this area of law.[2]

In this litigious society teachers must acknowledge that there are legal duties that they owe their students. A breach of a duty can result in legal action. Negligence suits have already been litigated concerning, among other things,

incompetent instruction,[3] improper supervision of physical education activities,[4] defective school equipment,[5] care and supervision of working with dangerous substances, such as chemicals,[6] teacher responsibility on field trips,[7] hazardous homework,[8] and performance of an errand at the request of school personnel.[9] But the degree to which high school journalism teachers can be held liable for injuries or damages resulting from investigative reporting assignments is still unchartered waters.

The probability of civil actions in this area can no longer be considered remote for a number of reasons. First of all, the "consciousness-raising" era of the late 1960's precipitated a demand for student rights and piqued the interest of student journalists in controversial issues that went far beyond the bounds of the traditional news-gathering parameters of the secondary school press. Secondly, litigation in pursuit of these student rights has resulted in a more "libertarian" public school press and certainly a diminished oversight role for school authorities. Thirdly, the Watergate revelations and the slickly-produced and highly controversial and popular TV news magazine programs, e.g. "60 Minutes" and "20/20", have reinforced the emotional and dramatic appeal of investigative reporting to student journalists.

But investigative reporting implies a corresponding responsibility that exceeds routine newsgathering assignments, and in the case of student reporters some of this responsibility

falls inevitably on the shoulders of the journalism teacher/adviser. This paper explores the unique "duty of care" that the public secondary school journalism teacher owes to his or her students in the instructional environment and the legal tort liability that might accrue from a "breach" of this responsibility, as well as negligent academic instruction. The significance of this study lies in the reality that journalism assignments, even within an educational institution, consistently impact more directly on the lives of other people than do assignments in most of the other disciplines.

II. THE SOURCE AND NATURE OF THE TEACHER'S AUTHORITY

If a high school journalism teacher is to be held liable in tort for a negligent breach of duty, it is essential to understand the source of the teacher's authority and the parameters of that authority. Such authority has rested for centuries on the concept of in loco parentis, a parental delegation of authority to the teacher for the purposes of the child's education.[10] The authority of the schoolmaster in fulfilling the educational mission was virtually absolute. However, if the parent is the source of the teacher's authority, a dilemma is posed concerning the withdrawal of this delegation[11] and the status of the parents' wishes vis-a-vis the school-related authority of the teacher.[12]

But with the emergence of mass education in this country in the Nineteenth Century, it was clear that this legal fiction of in loco parentis was incompatible with a system of public education, where neither parent nor child has any choice in the matter. As one court has noted:

> The relationship here in question is that of school district and school child. It is not a voluntary relationship. The child is compelled to attend school. He must yield obedience to school rules and discipline formulated and enforced pursuant to statute. . . . The result is that the protective custody of teachers is mandatorily substituted for that of the parent.[13]

Hence, the customary in loco parentis "voluntary" delegation of parental authority has gradually been replaced by state policy in which this delegation is one of law.[14] The logic of the supremacy of state policy over parental authority may be stated as follows: "The public school teacher stands in authority over the child by virtue of a confirmation of that authority by law, and the parent is powerless to restrict the common law, school-related authority of the teacher over the child."[15]

From a practical standpoint, the student-teacher relationship is still often described as one of in loco parentis. But the emerging role of the state as the source of the teacher's authority has had several visible effects. First of all, the scope of the doctrine of in loco parentis has been severely limited. The authority of the teacher is not coextensive with that of the parent.[16] The teacher's control is generally limited to situations which are related to the purposes of education and training (including discipline).[17]

Secondly, the authority which the teacher exercises in loco parentis must be "reasonable" and "prudent."[18] For example, an investigative reporting assignment for a high school journalism class (e.g. an interview with a member of a local street gang) that could foreseeably pose a risk to the student reporter might be "educationally related" but it could hardly be described as "prudent." In this instance, the teacher loses his or her defense of in loco parentis because the teacher is civilly liable for negligent injury to the child while the parent is not.[19] The scope and nature of the teacher's responsibility has been described in a legal article published in The Hastings Law Journal:

> Under familiar principles of tort law the concrete duty imposed by this attitude is that teachers and administrators must act toward pupils as would the reasonable, prudent person or parent under the circumstances. This standard does not make teachers the insurers of the safety of children. If school personnel have acted as the reasonable, prudent parent under the circumstances and nevertheless a child is injured, teacher or administrator cannot be held responsible. The teacher and administrator are not liable for pure accidents.[20]

The third visible effect of the evolution of state policy as the source of the teacher's authority has been manifested in statutory proscriptions and school district rules and regulations defining and limiting the conduct of school employees. These regulations usually set forth the criteria that the teacher must heed in his or her role.[21] While it might be assumed that reporting assignments are a routine component of the high school journalism curriculum, assignments which place the health and safety of the student

in jeopardy may run afoul of school policies prohibiting this kind of activity. If so, the journalism teacher has lost the cloak of in loco parentis. Although investigative reporting (especially involving controversial or sensational subjects) is a thriving component of contemporary journalism, assignments which involve foreseeable risks, especially in violation of school policy, would appear to contravene the fundamental principles of prudence and reasonableness that are at the heart of the doctrine of in loco parentis that flows from the state policy of mandatory public education.

In summary, since the source of authority for in loco parentis has shifted from the parent to the state, public policy requires that there be more of an accommodation between the authority of the teacher in educational matters and the rights of the parent. Exercise of authority is limited by prudence and reasonableness, and a breach of these duties is increasingly resulting in civil suits in tort to insure legal accountability on the part of the teacher. And judicial determinations unfavorable to the educational community will simply shift the weight of public policy in favor of the students and their parents and will further erode the authority of the teacher.

III. THE FIRST AMENDMENT AND THE ALTERATION OF THE TRADITIONAL STUDENT-TEACHER RELATIONSHIP

In recent years the concept of in loco parentis has been further eroded by the demand for full Constitutional rights for high school students. This movement has perhaps been most

visible in the area of First Amendment rights.[22] Until recently, school officials exercised almost unlimited control over student expression.[23] Faculty censorship of student publications was generally considered to be a matter of internal school policy and not a matter to be resolved by litigation.[24]

But the student rights movement of the 1960's altered this "ivory tower" view. In Tinker v. Des Moines Independent School District[25] the U.S. Supreme Court held that public school students have a Constitutional right of free expression which may be abridged only when such expression "materially and substantially" interferes with appropriate school discipline. Although the Tinker decision had nothing to do with student press freedom directly, in the 1970's federal courts readily extended the Tinker precedent to both high school and college journalists.[26] This issue has been examined extensively elsewhere and will be discussed only briefly here.[27]

Traeger and Dickerson,[28] writing in a 1980 Journalism Quarterly article, noted that U.S. appellate court decisions have divided into three camps on the question of prior restraint in high schools: (1) those which hold that prior restraint is acceptable if there are precise guidelines concerning the review procedures; (2) those which insist on explicit guidelines stating what content will not be acceptable for distribution and (3) a single court[29] which has specifically rejected these two approaches and held that prior restraint is no more permissible in public high schools than in the community at large. Thus, within just a decade the authority of high school officials to censor student publications had been severely curtailed. The

prevailing view of the principal and adviser standing in loco parentis had been replaced by one of state agents liable for the violation of students' Constitutional rights.

However, within the past five years the pendulum may have begun to shift slightly in the other direction.[30] In Frasca v. Andrews[31] a judge refused to second-guess a principal for halting distribution of a paper because of a fear that disruptions might result from certain items printed in the paper. In Williams v. Spencer[32] a federal appellate court affirmed a decision by school officials in Montgomery County, Maryland to prevent distribution of an underground newspaper because the paper contained advertising for a "head shop."[33]

But two 1977 decisions exemplify the difficulties of balancing new student freedoms with the continuing, albeit diminished, state interest under the doctrine of in loco parentis in protecting the health and welfare of minors. In one case[34] high school students in New York City attempted to distribute to their fellow students a questionnaire surveying sexual attitudes. The results were to be published in the school newspaper. The principal denied the students permission to distribute the questionnaire, and this decision was upheld by the Secretary of the Board of Education. The federal appellate court affirmed the action of the Board on the grounds that there was a basis for the conclusion that significant "psychological" harm might result to some of the students.[35]

The court in this case deferred to the school administration's experience and expert knowledge despite conflicting

evidence as to the potential psychological harm. But when arrayed against the student rights cases summarized earlier, this decision begs the following question: May a school official, including the journalism teacher/adviser, impose a prior restraint when, in the judgment of that official, there is a potential danger posed by the contents of the article? In addition, if such a danger is posed and the teacher fails to act, is he or she liable in tort for damages or injuries to third parties? Such a situation could arise, for example, if a student reporter researches and publishes the plans on how to produce a home-made bomb.

In the same year as the case described above (1977), the Fourth Circuit affirmed the right of Virginia high school students to publish an article on birth control.[36] The principal had sought to prevent publication on the grounds that sex education was not a part of the curriculum and therefore should not be allowed on the pages of the school newspaper.

But these two cases illustrate some inherent conflicts of competing interests in education law. It is a well established legal principle that the state has a special interest in protecting the welfare of children and in safeguarding them from abuses.[37] And the Supreme Court has held that, in addition to this independent state interest in the well-being of its youth, there is an interest derived from that of the parents.[38] The parents' authority to control their children's rearing and values is fundamental to our society, and therefore a state legislature or school board might conclude that parents are entitled to the support of laws which aid them.[39] In addition, the extent of permissible regulation of minors is sometimes

greater than that for adults.[40] As one legal scholar, in summarizing this line of cases, has noted:

> As the state's authority to regulate material read by children is greater than the right to regulate adult reading matter, so it appears that limitations on first amendment rights within the school walls may be different, and perhaps greater, than constitutionally permissible restrictions outside them.[41]

The bottom line of all of these somewhat contradictory decisions is that the high school journalism teacher, in the absence of a definitive Supreme Court ruling on the matter, is left in a precarious position. The students' rights cases have substantially removed the protective cloak of the teacher acting in loco parentis. In other words, as a state employee the teacher is Constitutionally restrained against interference with the students' rights of free expression. And yet, school officials are expected to exert the state's interest in protecting the students' welfare whenever a potential danger arises. Apparently, this danger could include perceived psychological or physical harm resulting from the newsgathering efforts of high school journalists. And failure to act (whether under the proscriptions of the First Amendment or otherwise) could result in an action in tort from the very parents on whose behalf those officials have been charged to act in loco parentis.

IV. THE TEACHER AS STATE EMPLOYEE AND THE DOCTRINES OF SOVEREIGN IMMUNITY AND RESPONDEAT SUPERIOR

If the teacher's authority flows from the state and yet his supervisory responsibilities are Constitutionally limited, what immunity from liability or at least what

"shared liability" with his state employer might the instructor enjoy in a tort action for negligence. This question is important because it relates to the degree of instructor accountability discussed in the next section. If there is any immunity from liability, it must exist under either the doctrines of sovereign immunity or respondeat superior.

The doctrine of sovereign immunity originated in England, where the courts accepted the belief that the "king could do no wrong" and routinely dismissed cases against the government.[42] This immunity was also extended to officers and agents of the crown. The concept was initially applied in the United States by a Massachusetts court in 1812[43] and was readily extended to all governmental and quasi-governmental bodies in the United States.

Historically, sovereign immunity has been applied to school districts, although a majority of states have increasingly waived their immunity.[44] The application of governmental immunity to school districts appears to have been predicated upon at least four principles: (1) that the schools, as performers of a governmental function, could do no wrong;[45] (2) that since no corporate funds had been appropriated for indemnification, any payment of claims would be improper;[46] (3) that the individual suffering the injury should bear the cost, rather than imposing this burden on the school district;[47] and (4) that since school districts are authorized to carry out only those acts required by statute, no authority exists for the district to commit a tort or make payment of damages.[48]

Although the teacher is a state employee acting *in loco parentis*, the doctrine of sovereign immunity does not apply to the tortious conduct of the teacher. Traditionally, the employer has been responsible for the acts of his employees under the doctrine of *respondeat superior* and generally indemnifies, at least in part, the employee against judgments in favor of the plaintiff. However, *respondeat superior*, in the past, has been inapplicable to public school teachers because of the sovereign immunity of school districts.[49] However, state legislatures, recognizing the financial hardships that immunity can impose on injured parties, have increasingly modified or abolished the immunity of school districts. But this has been coupled, in many cases, with the purchase of liability insurance to cover employees' negligent acts. Most of these "save harmless" statutes require that the school district defend employees charged with negligent conduct, but a few make this defense discretionary.[50] Ironically, the existence of liability insurance has increased the likelihood of lawsuits, since the teacher is often indemnified against liability for his or her own tortious acts.[51]

It would appear that, as states have increasingly abrogated the doctrine of governmental immunity for school districts, liability through the doctrine of *respondeat superior* has become applicable.[52] As one court has noted: "Since the municipal corporation can act only as an agent, the negligence of the agent is imputable to the Board of

Education as principal."[53] However, the doctrine of respondeat superior is inapplicable if the teacher is acting outside the scope of his or her employment.[54]

Some public school teachers are of the erroneous impression that, as employees of the state, they are not responsible for their negligent acts. But the doctrine of respondeat superior does not absolve the teacher of legal liability for his or her negligent acts. Liability insurance may provide some indemnification for the school employee, but it doesn't diminish the degree of fault of a tortious act.

V. THE JOURNALISM TEACHER AND NEGLIGENT CONDUCT

Simply defined, negligence is "conduct that falls below a standard of care established by law to protect others against an unreasonable risk of harm."[55] There is an affirmative obligation to behave responsibly and prudently. As Seitz noted in a 1971 article in the Cleveland State Law Review:

> Under tort law the basic responsibility of a teacher or administrator is no different than that which rests generally on every member in society. An individual must take reasonable care to avoid acts or omissions which he can reasonably foresee would be likely to injure his neighbor. Courts recognize that pupils fall within the category of neighbors so as to cause teachers and administrators to have them in contemplation when they act or omit to act. The concrete duty imposed by this attitude is that teachers and administrators must act toward pupils as would a reasonable, prudent person under the circumstances.[56]

In order to sustain a cause of action based upon negligence, the plaintiff must demonstrate that (1) the defendant owed a duty to the plaintiff to act in conformity with some standard of care; (2) the defendant failed to act in

accordance with the appropriate standard of care (breach of duty); (3) a legally compensable injury was suffered by the plaintiff; and (4) there was a proximate causal relationship between the defendant's breach and the plaintiff's injury.[57] The concepts of "duty", "standard of care" and "breach of duty" are central to the issue under discussion because they go to the heart of the journalism teacher's role and responsibilities in the public school of the 1980's.

A. The Concept of Duty

A "duty" is a legally imposed obligation arising by virtue of some relationship between two parties requiring one party to conform to a standard of care for the benefit or protection of the other.[58] The rules are often judge-made and usually reflect the contemporary social and political environment.

During the Nineteenth Century duty was a "mechanistic" concept designed to restrict the number of cases and to provide compensation only where there was legal fault. This approach provided citizens with an incentive to insure their own safety. Under such an approach, judicial determinations rarely addressed underlying issues of social policy.[59]

In recognition of the complexity and collectivization of modern society, courts have increasingly embraced socio-economic-political considerations within the concept of duty. This new expression of duty has manifested itself in three ways. First of all, courts have emphasized a "social values" philosophy reflected in a decided shift to a "victim-oriented" approach. Courts appear to have developed a distaste for fixed

rules and prefer, instead, case-by-case adjudication to the problem of compensation. In addition, the importance of the plaintiff's "reasonable expectation" of safety has been stressed. This emphasis on expectation arises out of a policy determination that the public has a right to expect a certain performance or standard of conduct from a defendant because of the defendant's status, e.g. a landlord, a manufacturer, or a teacher. In other words, the high school journalism instructor is embued, as a matter of public policy, with a "trust," both as a teacher and as an "expert" within his or her academic specialty.

Secondly, economic theory has also been relied upon in apportioning liability. This approach may stress the importance of reducing negligent acts (or reaching acceptable safety levels) or it may focus on the defendant's ability to absorb and spread the risk of financial loss.[60] This approach has become more prevalent in educational litigation with the waiving of sovereign immunity and the presence of liability insurance.

Thirdly, some legal scholars view the expanding notion of duty as a political tool. In other words, tort litigation signifies an attempt to control and frustrate institutional behavior. Thus, the role of tort law is viewed as an effort to control institutional behavior and to provide the catalyst for policy changes. This function is achieved by forcing institutions to pay out damage awards and by stigmatizing their behavior as "unlawful" through media coverage of injury suits.[61] This institutional stigma often infects individual

employees, at least in the collective minds of the consumer, and this probably accounts for the increasingly adversarial relationship between teachers and educational institutions and parents, as suggested at the outset of this paper.

If the teacher owes a duty to the student, exactly what is the nature of this duty? From a legal standpoint relative to the educational function, there appear to be two: instruction and supervision.[62]

1. The Duty of Journalism Instruction -- The primary reason for the teacher's presence in the classroom is to instruct students. There are two basic obligations related to instruction.[63] The first is that the instruction result in the student's mastery of a certain body of knowledge and skills. From the standpoint of journalism secondary education, no longer should the teacher be content to confine instruction to the "nuts and bolts" of the "inverted pyramid," graphics, layout and editing. The student must also be instructed in the theoretical underpinnings of the communications process and the legal liabilities that might accrue from what one publishes. In short, legal instruction (e.g., the laws of libel and invasion of privacy) should be an integral component of any secondary school journalism curriculum. While recent court decisions have limited the right of a high school to "censor" the newspaper, the failure of a teacher to advise students concerning a potentially defamatory article (pre-publication "review" is generally permissible) or to provide instruction on the elements of libel could conceivably be viewed as a breach of the instructional duty.

The second obligation relating to instruction is that students should not participate in any activity without adequate and proper preparation by the teacher regarding the performance of a specific function.[64] If the student reporter plans to assume the "Woodward-Bernstein" complex at such an early age and to enter the "glamorous" world of the investigative reporter, the teacher should at least instruct the student in the techniques and dangers of this brand of journalism. In those cases where there is a foreseeable and "clear and present" danger (e.g., a feature on local street gangs), the instructor should certainly refrain from suggesting such assignments and should act affirmatively to prevent this kind of undertaking.

2. The Duty of Supervision -- The second primary duty of the journalism teacher is supervision.[65] It is the instructor's responsibility to be aware of all assignments (including those made by the student editor) and class-related activities in which his or her students are involved. The duty of supervision is an affirmative one and includes the educator's role as newspaper adviser, as well as journalism teacher. In this regard, prudent supervision would probably include full consultation with student reporters and editors and even a review of material prior to publication. A pre-publication review by an adviser is not violative of the First Amendment per se. "Advice" (i.e. regarding a questionable article) does not necessarily constitute censorship, but it does represent an important link in the chain of the duty of supervision. From a legal standpoint, the function of this advice to

student reporters on the newspaper is to show the good faith of the instructor and to demonstrate an absence of negligence on the part of the journalism faculty member.

B. Standard of Care

Once a duty has been established, a plaintiff must then develop a standard of care that can be used by a court to determine whether an educator has breached his or her duty. Except in cases involving physical injuries, this is still a fluid area in education law.

In the absence of some legally defined alternative, the plaintiff, in filing a negligence action in tort against a journalism teacher, would probably choose between proposing either a reasonable person or a professional standard of care.[66] The former is often defined as "the conduct of the reasonable person of ordinary prudence under the circumstances."[67] The reasonable person standard is typically applied in cases surrounding a teacher's duty regarding the physical safety of students. In these situations this standard is effective because "supervision of the physical activities of children is a function frequently experienced by the general public and readily comprehended by jurors without expert testimony."[68] Reporting assignments that pose a clear and foreseeable physical risk to the student journalist would probably fall under the reasonable person standard as a breach of the duty to supervise.

But the application of this standard to the area of journalism instruction per se is questionable. Most laypersons are not competent to evaluate the requirements of the educational

process. For example, the average juror probably could not appreciate the importance of media law in the journalism curriculum nor could he or she be expected to comprehend the extent to which the teacher should be knowledgeable in this area. As one legal scholar has noted:

> Unlike the supervision of the physical safety of children, academic instruction in the public schools has no close analogy in the experience of most laymen. It has been suggested that, because most laymen lack exposure to the realities of the educator's task, and because there is no consensus on acceptable teaching methods, the use of a reasonable person standard would inevitably result in arbitrary decisions. The possibility of arbitrariness is most obvious in jury trials because virtually every potential juror has been a student and frequently has formulated definite ideas on the propriety of certain behaviors based on his one-sided and highly person view of the process. Therefore, although there probably would be consensus on the unacceptability of certain clearly egregious forms of conduct, the reasonable person standard of care is generally unsatisfactory in educational negligence actions.[69]

Thus, a professional standard of care would appear to be more appropriate for judging a breach of the instructional duty. But a professional standard must be predicated upon two elements: (1) a minimum level of skill and knowledge common to members of the profession in good standing; and (2) a minimum standard of customary conduct and behavior adhered to by members of the profession.

A professional is presumed to possess the common skill and knowledge of members of that profession.[70] The teacher certification requirements that limit admission to those who have a certain degree of formal education and can pass a qualifying exam are a traditional indicium of professional

status.[71] In fact, one court has compared teaching certificates to the admission to the bar required of practicing attorneys.[72] Numerous legal decisions have recognized that school boards are justified in requiring their teachers to meet standards of competence expected of professionals.[73] And at least one court has upheld a state statute that provided more flexible procedures and grounds for dismissal of teachers than for other professionals:

> But the teaching profession differs from these other professions in many respects, including the special vulnerability of the client population, the high duty of care owed by the state to that group, and the unique responsibility which the state has to provide an effective system of education.[74]

Nonetheless, the question of a teacher's professional competence is clearly not an easy one. The teacher's unique understanding of his work is not supported by empirical evidence and is implied from the "empirically unverified notion that study and experience will produce better teaching performance."[75] This is an especially perplexing problem within the journalism teaching discipline, where a unique blend of academic knowledge and professional experience is required. In fact, there is evidence to suggest that many secondary school journalism instructors would fall short of a "professional standard of care." A 1980 nationwide study of high school journalism advisers revealed that more than one-third of the respondents had taken no journalism courses, three-fourths had taken no courses in education or mass communication law, almost two-thirds were not certified teachers of journalism and more than two-thirds had not worked professionally as journalists.[76]

Professionals are also expected to adhere to a minimum standard of conduct and behavior. The NEA's Code of Ethics represents an attempt at self-regulation. In addition, state laws and administrative regulations and rules have often codified the professional status of teaching.[77] But the journalism teacher's level of conduct and accountability may well exceed his or her academic peers in other disciplines because (1) the student output (i.e. the school newspaper) touches directly and immediately the lives of others, (2) the journalistic discipline itself is imbued with a Constitutional dimension not characteristic of most other academic fields, and (3) there is a professional journalism constituency that has, over the years, established certain (albeit voluntary) standards of conduct. Hence, the secondary school journalism teacher could conceivably be held accountable under the standards of care of both the teaching profession and the journalistic community. For example, failure to instruct student reporters as to professional ethics and standards of responsible journalism might provide the basis for a cause of action for negligence, assuming that a third party were damaged as a result of reckless or irresponsible reporting. Based on the profile of high school newspaper advisers described above, there should be a continuing concern about the professional and academic preparation of secondary school journalism advisers and teachers.

C. Breach of Duty: Misfeasance and Nonfeasance

At the risk of some redundancy, it should again be pointed out that journalism teachers could be liable in tort in two basic situations. The teacher could be liable for misfeasance, that is, an affirmative risk-creating act. In such cases, the student reporter might be put in danger by virtue of a risky investigative reporting assignment. Usually, the instructor either assigns the story or recommends to the editor that the story be covered. Assuming that the student is injured, the instructor could be accountable for a negligent breach of duty. However, the element of "foreseeability" must be present. In other words, there must exist the probability, known to the instructor, that injury could result from the assignment. In addition, the negligent act must be the "proximate cause" of the injury.[78] For example, if the student is pursuing his assignment and is hit by an automobile, it cannot be said that the assignment per se resulted in injury to the novice reporter.

A breach of duty could also result from nonfeasance, that is, a failure to act so as to protect the plaintiff. Under such circumstances, the plaintiff (or plaintiffs) is likely to be either a third party, i.e. the subject of an article published in the school newspaper, or a student reporter that embarks upon an investigative reporting assignment with the "acquiescence" of the teacher. In the former case, a faculty member could be considered negligent for not instructing and

advising students regarding legal civil liability for what they publish. Admittedly, the recent line of decisions regarding the high school press has failed to resolve the question of tort liability (e.g. in a defamation action) of the faculty adviser for student publications. This question has been discussed elsewhere[79] and will not be reexamined here. The issue in this instance is not teacher liability for tortious content of student publications; the issue here involves the degree to which journalism faculty members can be held negligent for failure, either through carelessness, ignorance or incompetence, to "instruct and advise" their students about questionable content. This is not to suggest that journalism teachers are expected to be experts in the law of tort. The professional is not liable for an honest mistake in judgment <u>when there is room for reasonable doubt about the proper course of action.</u>[80]

The instructor could also be liable for nonfeasance if he fails to recognize a potentially dangerous assignment handed out by a student editor. The degree to which the newsgathering process itself is Constitutionally protected within the high school environment is unclear. But under the "balancing" system often employed within our judicial system, a court might well conclude that an instructor's duty to protect a student from foreseeable and probable physical injury outweighs the investigatory newsgathering rights of the student journalist. Hence, the failure to fulfill this duty could result in an action for tort by the parents of

the injured student against negligent faculty members. In this instance, the journalism teacher/adviser could not use the Constitution as an excuse for tortious conduct.

VI. CONCLUSIONS

It is clear that, in this era of abundant litigation, the public school teacher is particularly vulnerable to suits arising out of personal injury to their students. Journalism instructors are in a precarious position because of the limited control that they can now exercise over the content of student publications. But public school faculty have a legal duty to supervise and to instruct, and the failure to fulfill this obligation can result in tort liability.

Liability could result from either misfeasance or nonfeasance. In the former, the instructor might be negligent for affirmatively creating a risk to the health and safety of the student. Such a situation would exist if a student reporter is injured during an investigative reporting assignment, assuming that the teacher could reasonably anticipate the danger.

The journalism teacher might also conceivably be held liable for nonfeasance if he or she fails to "advise" a student reporter or editor properly concerning tortious content of fails to provide proper instruction within the curriculum concerning the legal responsibilities of news-gathering and publication. Neither advisers nor students are expected to be "legal experts," but they should certainly be

able to recognize potential legal problems. Nonfeasance resembles "educational malpractice" more closely than misfeasance, and the evolving body of law in this area should be of continuing interest to the high school journalism instructor.

Perhaps the best protection against lawsuits is for school districts to hire only certified journalism teachers (preferably with some professional experience) who are trained in the standards and practices of the profession. Unfortunately, the movement in this direction has been disappointing. But accountability is an inescapable requirement of the contemporary academy, and teachers must exercise an increasingly higher degree of care in how they instruct and supervise their students. The journalism teacher who is ill-trained and poorly prepared and fails to recognize this reality may well have his day in court, whether he wants to or not.

REFERENCES

[1]E.g., as early as 1943 the U.S. Supreme Court held that under the First Amendment the public school student may not be compelled to salute the flag. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943). In Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), the Court held that a school could not Constitutionally restrict the wearing of black arm bands to protest the Vietnam War, unless there is evidence that the work of the school would be disrupted.

[2]Robert D. Bickel, "Legal Rights and Responsibilities of Students," 53 Florida Bar Journal 660 (1979).

[3]E.g., see Peter W. v. San Francisco Unified School District, 60 Cal. App. 3d 814 (1976); Hoffman v. Board of Education, 64 App. Div. 2d 369 (1978), rev'd 49 N.Y. 2d 121 (1979); Donohue v. Copiague Union Free School District, 95 Misc. 2d 1 (1977), aff'd 64 App. Div. 2d 29 (1978), aff'd 47 N.Y. 2d 440 (1979). For a discussion of a cause of action for incompetent academic instruction, see Comment, "Educational Negligence: A Student's Cause of Action For Incompetent Academic Instruction," 58 North Carolina Law Review 561 (1979-80).

[4]La Valley v. Stanford, 272 App. Div. 183 (1947); Armlin v. Board of Education of Middleburg Central School District, 36 App. Div. 2d 877 (1971).

[5]Meyer v. Board of Education, 86 A.2d 761 (1952); Lehmann v. Los Angeles City Board of Education, 316 p.2d 35 (1950); Duncan v. Koustenis, 278 A.2d 547 (1970); Weber v. State, 53 N.Y.S. 2d 598 (Ct. of Claims, 1945).

[6]Mastrangelo v. West Side Union High School District, 42 P.2d 634 (1935).

[7]Cox v. Barnes, 469 S.W. 2d 61 (1971); Castro v. Los Angeles Board of Education, 54 Cal. App. 3d 232 (1976). For a discussion of this issue, see Charles R. DuVall and Wayne J. Krepel, "Teacher Liability During Field Trips," 1 Journal of Law and Education 637 (Oct. 1972).

[8]E.g., see Calandri v. Ione Unified School District, 219 Cal. App. 2d 542 (1963); Simmons v. Beauregard Parish School Board, 315 So. 2d 883 (La. App. 3rd Cir., 1975).

[9]E.g., see McMullen v. Ursuline Order of Sisters, 246 P.2d 1052 (1952); Harrison v. Caddo Parish School Board, 179 So. 2d 926 (La. App. 2nd Cir., 1965). For a discussion of the principles and cases relating to "off-premises" liability, see W. Paul Hagenau, "Penumbras of Care Beyond the Schoolhouse Gate," 9 Journal of Law and Education 201 (April 1980).

[10]1 Blackstone, Commentaries 453 (Lewis Ed., 1922); Reg. v. Hopley, 2 F&F 202 (1860); Cleary v. Booth, 1 Q.B. 465 (1893).

[11]See 12 Halsbury, Laws of England 138, para. 297 (2d Ed., 1934).

[12]See Paul O. Proehl, "Tort Liability of Teachers," in Thomas G. Roady, Jr. and William R. Andersen (ed.), Professional Negligence (Nashville, Tenn.: Vanderbilt Univ. Press, 1960), p. 188.

[13]McLeod v. Grant Co. School District, 42 Wash. 2d 316, 255 P.2d 360, 362 (1953) (emphasis mine).

[14]Stevens v. Fassett, 27 Me. 266 (1847); Ibid.

[15]Proehl, op. cit., 189.

[16]Ibid.; Also see 1 Harper & James, Torts 291 (1956).

[17]Ibid.

[18]E.g., see Ohman v. Board of Education, 90 N.E. 2d 474 (1949); Lee v. Board of Education, 263 App. Div. 23 (1st Dep't, 1941).

[19]Proehl, op. cit., 191. In general, minors cannot sue their parents for tort liability, although some exceptions are beginning to emerge. However, parents can still be liable criminally for physical abuses to their children.

[20]Reynolds C. Seitz, "Legal Responsibility Under Tort Law of School Personnel and School Districts As Regards Negligent Conduct Toward Pupils," 15 Hastings Law Journal 495, 496-7 (1963-64).

[21]Stephen R. Ripps, "The Tort Liability of the Classroom Teacher," 9 Akron Law Review 19, 21 (Summer 1975).

[22]For an analysis of the application of the First Amendment to minors, see John H. Garvey, "Children and the First Amendment," 57 Texas Law Review 321 (Feb. 1979).

[23]E.g., see Wooster v. Sutherland, 148 P. 959 (1915); Tanton v. McKenney, 197 N.W. 510 (1924); Lander v. Seaver, 32 Vt. 114 (1959). For the views of principals and advisers on censorship, see Don D. Horine, "How Principals, Advisers and Editors View the High School Newspaper," 43 Journalism Quarterly 339 (Summer 1966).

[24]George E. Stevens, "Faculty Tort Liability For Libelous Student Publications," 5 Journal of Law and Education 307 (July 1976).

[25]Supra note 1.

[26]E.g., see Gambino v. Fairfax County School Board, 429 F. Supp. 731, aff'd 564 F.2d 157 (4th Cir., 1977); Nitzberg v. Parks, 525 F.2d 378 (4th Cir., 1975); Baughman v. Freiermuth 478 F.2d 1345 (4th Cir., 1973); Fujishima v. Board of Education, 460 F.2d 1355 (7th Cir., 1972); Eisner v. Stamford Board of Education, 440 F.2d 803 (2d Cir., 1971); Quarterman v. Byrd, 453 F.2d 54 (4th Cir., 1971).

[27]E.g., see George Stevens and John Webster. Law and the Student Press (Ames, Iowa: Iowa University Press, 1973); Jack Nelson. Captive Voices: The Report of the Commission of Inquiry Into High School Journalism (New York: Schocken Books, Inc., 1974); Patricia Hollander. Legal Handbook For Educators (Boulder, Colorado: Frederick A. Praeger, 1978); Bickel, supra note 2.

[28]Robert Traeger and Donna L. Dickerson, "Prior Restraint In High School: Law, Attitudes and Practice," 57 Journalism Quarterly 135 (Spring 1980).

[29]Fujishima v. Board of Education, supra note 26.

[30]A discussion of this countervailing trend was presented in a paper submitted to the AEJ Secondary Education Division at the 1981 Convention: "Student Press Freedom: Retrenchment In the 1980's" (Author unidentified).

[31]463 F. Supp. 1043 (1979).

[32]622 F.2d 1200 (4th Cir., 1980).

[33]But see Thomas v. Granville Board of Education, 607 F.2d 1043 (2d Cir., 1979), overturning disciplinary action against students who distributed copies of an underground newspaper near school property.

[34]Trachtman v. Anker, 563 F.2d 512 (2d Cir., 1977), cert. denied, 98 S.Ct. 925 (1978).

[35]Ibid. The school board's experts felt that the questionnaire was potentially dangerous to any student with a "brittle sexual adjustment," might cause "considerable anxiety and tension," and would cause large numbers of students to "need help dealing with anxiety reactions caused by confronting the questionnaire." See Priscilla Diamong, "Interference With the Rights of Others: Authority To Restrict Students' First Amendment Rights," 8 Journal of Law and Education 347 (July 1979).

[36]Gambino v. Fairfax County School Board, supra note 26.

[37]Prince v. Commonwealth of Massachusetts, 321 U.S. 158 (1944), reh. den. 321 U.S. 804 (1944).

[38]Ginsburg v. State of New York, 390 U.S. 629 (1968).

[39]Diamond, op. cit., 349-50.

[40]Supra note 38; Redrup v. New York, 386 U.S. 767 (1967), reh. den. 388 U.S. 924 (1967).

[41]Diamond, op. cit., 350.

[42]John B. Mancke, "Liability of School Districts For the Negligent Acts of Their Employees," 1 Journal of Law and Education 637 (Jan. 1972).

[43]Mower v. The Inhabitants of Leicester, 9 Mass. Rep. 247 (1812).

[44]E.g., see Ripps, op. cit., 20.

[45]E.g., see School District No. 48 of Maricopa County v. Rivera, 30 Ariz. 1,243,609 (1926), overruled in Stone v. Arizona Highway Commissioners, 381 P.2d 107 (1963).

[46]E.g., see Freel v. School City of Crawfordsville, 41 N.E. 312 (1895).

[47]See Thacker v. Pike County Board of Education, 193 S.W. 2d 409 (1946); Ford v. School District of Kendall, 15 A. 812 (1888).

[48]See Bingham v. Board of Education of Ogden, 223 P.2d 432 (1950).

[49]Ripps, op. cit., 19.

[50]Mancke, op. cit., 115.

[51]For a discussion of the scope and kinds of liability insurance, see Ibid., 113-17.

[52]Mancke, op. cit., 118.

[53]Shaw v. Village of Hempstead, 246 N.Y.S. 2d 557, 559 (1964).

[54]Mancke, op. cit., 118.

[55]Ripps, op. cit., 25.

[56]Reynolds C. Seitz, "Tort Liability of Teachers and Administrators For Negligent Conduct Toward Pupils," 20 Cleveland State Law Review 551 (Sept. 1971).

[57]W. Prosser, The Law of Torts 143 (4th Ed., 1971).

[58]Mathew A. Hodel, "The Modern Concept of Duty: Hoyen v. Manhattan Beach City School District and School District Liability For Injuries To Truants," 20 Hastings Law Journal 1893 (July 1979).

[59]E.g., see 2 F. Harper & F. James, The Law of Torts 762 (1956).

[60]Hodel, op. cit., 1907.

[61]Robert H. Sulnick, "A Political Perspective of Tort Law," 7 Loyola of Los Angeles Law Review 410, 415-22 (1974).

[62]Proper maintenance and upkeep of all equipment and supplies is also a duty but is irrelevant to the present discussion.

[63]Richard S. Vacca, "Teacher Malpractice," 8 Univ. of Richmond Law Review 447, 452-3 (1973-74).

[64]See Ripps, op. cit., 28.

[65]For a discussion of the duty of supervision, Seitz, supra note 56 at 552-7.

[66]Comment, supra note 3 at 573.

[67]57 Am. Jur. 2d sec. 69.

[68]Ibid.

[69]Comment, supra note 3 at 573 (notes omitted).

[70]Prosser, op. cit., 161-65.

[71]John Elson, "A Common Law Remedy For the Educational Harms Caused By Incompetent or Careless Teaching," 73 Northwestern Univ. Law Review 641, 725 (Nov. 1978).

[72]McDonald v. Nielson, 175 N.W. 361, 363 (1919).

[73]E.g., see Sterzing v. Fort Bend Independent School District, 376 F. Supp. 657, 662 (S.D. Tex., 1972); Berg v. Merricks, 318 A.2d 220 (1974); Meinhold v. Clark County School District, 506 P.2d 420 (Nev., 1973).

[74]Pordum v. Board of Regents, 491 F.2d 1281, 1286 (2d Cir., 1974).

[75]Elson, op. cit., 731.

[76]Alice Gagnard, "Ethical/Legal Dichotomies On the First Amendment Rights of the Student Press." Paper presented to the Secondary Education Division, AEJ Convention, Boston, Mass., August 1980, p. 9.

[77]E.g.,the Georgia Professional Teaching Practices Act states: "It is the intent and purpose of the General Assembly that the practice of teaching, including administrative and supervisory services, shall be designated as professional services. Teaching is hereby declared to be a profession in Georgia, with all the similar rights, responsibilities and privileges accorded other legally recognized professions." Ga. Code Ann. sec. 32-838 (1967).

[78]See Prosser, op. cit., sec. 42, at 244.

[79]E.g., see Stevens, supra note 24.

[80]Prosser, op. cit., 161-65.